# No. 12,924

# United States Court of Appeals For the Ninth Circuit

In the Matter of LINCOLN MINING COMPANY, INC. (a corporation), Debtor.

G. McGuire Pierce,

Appellant,

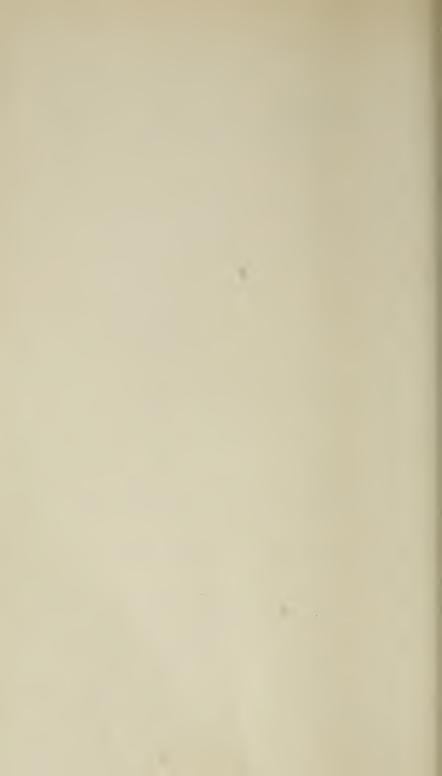
VS.

LINCOLN MINING COMPANY, INC. (a corporation),

Appellee.

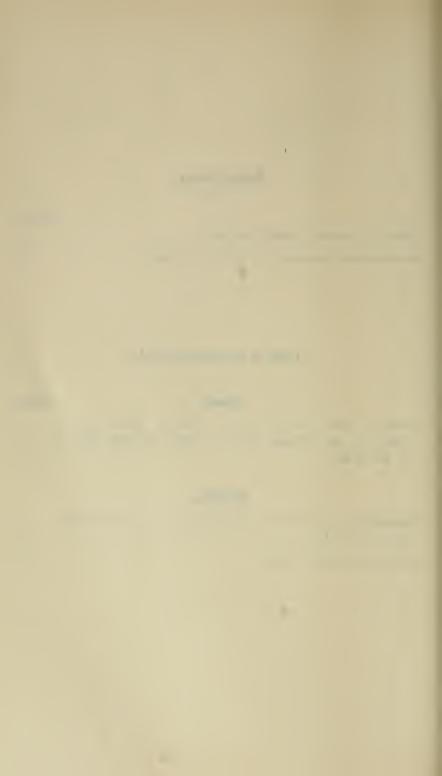
# NOTICE OF MOTION TO DISMISS APPEAL and MEMORANDUM IN SUPPORT THEREOF.

Morse & Graves, 25 Fremont Street, Las Vegas, Nevada, Attorneys for Appellee and Movant.



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# United States Court of Appeals For the Ninth Circuit

In the Matter of

LINCOLN MINING COMPANY, INC. (a corporation),

Debtor.

G. McGuire Pierce,

Appellant,

VS.

Lincoln Mining Company, Inc. (a corporation),

Appellee.

## NOTICE OF MOTION TO DISMISS APPEAL.

To the Honorable William Denman, Chief Judge, and to the Honorable Associates Judges of the United States Court of Appeals for the Ninth Circuit:

To G. McGuire Pierce, Appellant:

To Hawkins and Cannon, 125 South Second Street, Las Vegas, Nevada, and Kyle Z. Grainger, Esq., 830 H. W. Hellman Building, 354 South Spring Street, Los Angeles 13, California, Attorneys for Appellant: You, and each one of you, will please take notice that on Monday, the 30th day of July, 1951, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel may be heard, in the courtroom of the above entitled Court, in the City of San Francisco, State of California, Lincoln Mining Company, Inc., Debtor and Appellee will move the Honorable United States Court of Appeals for the Ninth Circuit for an Order dismissing the appeal of G. McGuire Pierce from that Order refusing confirmation of plan made and entered in the United States District Court for the District of Nevada, in the action therein pending, on the 9th day of March, 1951.

Said motion will be made, based and grounded upon the following reasons, to wit:

- 1. That G. McGuire Pierce is not a party to the action and has no appealable interest and has no right of appeal.
- 2. That G. McGuire Pierce is not a stockholder, creditor, or otherwise interested in these proceedings.
- 3. That G. McGuire Pierce's only appearance in this action was his letter to George W. Thiriot, president of the Lincoln Mining Company, Inc., which formed the basis of the amended plan of reorganization, all under date of November 6, 1950.
- 4. That upon the final hearing by the court below of the confirmation of the plan it was disaffirmed and the proceedings dismissed.

For the convenience of this Honorable Court, and also due to the fact that the record on appeal has

not yet been printed at the date this motion is drawn, we quote in haec verba the Findings of Fact and Order Refusing Confirmation of Plan, made and entered on the 9th day of March, 1951, at Las Vegas, Nevada; and also the Order of Respondent Court, dated April 5, 1951:

In the District Court of the United States of America, in and for the District of Nevada.

In the Matter of
Lincoln Mining Company, Inc.,
Debtor

In Reorganization No. A-60-A

# FINDINGS OF FACT AND ORDER REFUSING CONFIRMATION OF PLAN.

"The order of the judge approving a plan, as provided in section 574 of this title, shall not affect the right of the debtor, a creditor, indenture trustee, or stockholder to object to the confirmation of the plan." 11 U.S.C.A. § 580.

"The plan of reorganization must be 'fair and equitable.' Such is the mandate of the statute (11 U.S. C.A. § 621)." Petition of Portland Electric Power Co., 9 Cir., 162 F. 2d 618.

In reorganization proceedings the purpose is rehabilitation of the debtor and to preserve it as a going concern if possible; therefore, it is vital that favorable leases be held and unfavorable leases be rejected. Title Insurance & Guaranty Co. v. Hart, 9 Cir., 160 F. 2d 961.

Sec. 116 of Chapter X (11 U.S.C.A. § 516(1)) gives the judge power to permit the rejection of executory contracts. The term "executory contracts" includes leases. 11 U.S.C.A. § 506(7).

"In case an executory contract shall be rejected pursuant to the provisions of a plan or to the permission of the court given in a proceeding under this chapter \* \* \* any person injured by such rejection shall, for the purposes of this chapter and of the plan, its acceptance and confirmation, be deemed a creditor." 11 U.S.C.A. § 602.

This case came on to be heard on the 12th day of February, 1951, pursuant to the Order of this Court of December 29, 1950, directing Lincoln Mining Company, Inc., Debtor, to show cause on the 2d day of March, 1951, at 10:00 o'clock in the forenoon of that day at the courtroom of the above entitled Court in the United States Post Office and Courthouse at Las Vegas, Nevada, why the amended and approved plan of reorganization should not be confirmed notwithstanding the objections of the debtor corporation filed December 15, 1950. By consent of counsel the date of hearing of said Order to Show Cause was advanced to February 12, 1951, by order entered upon the minutes of this Court and the said hearing commencing on the 12th day of February, 1951, was continued from time to time until this date.

Having considered the said objections of the debtor corporation filed December 15, 1950, and the reply thereto of G. McGuire Pierce filed December 19, 1950, together with the Report of the Referee and Special Master on said objections and reply, the Court hereby makes findings of fact as follows:

### FINDINGS OF FACT.

- 1. The Court accepts the Referee and Special Master's Finding No. 1 and No. 2.
- 2. That on or about the 6th day of November, 1950, by order of this Court the new plan proposed by G. W. Thiriot, President of Lincoln Mining Company, Inc., was considered and treated as the modification of the plan heretofore approved September 26, 1950, and the Court ordered that such new plan be filed as such modification and fixed the 21st day of November, 1950, at 9:30 a. m. as the time and the courtroom of the United States District Court at Las Vegas, Nevada, as the place for the consideration of such new plan or modification and for the hearing of objections thereto.

That the proposed modification of the original plan filed herein by G. W. Thiriot November 6, 1950, included therein as Paragraph V the following:

"Mr. George McGuire Pierce, 6057 Maryland Drive, Los Angeles, California 36, makes the proposition to pay off the indebtedness of Lincoln Mining Company Inc., in return for a bond and lease on the property, buildings, machinery, etc., for a period of ten (10) years. A total purchase price of \$150,000.00 payable from royalties at the rate of 10% on net returns to apply

on purchase price. A contract to be worked out and executed if sanctioned by the court."

3. That on the 21st day of November, 1950, and at the place set for the consideration of said modified plan, the said G. McGuire Pierce, without prior notice to the corporation or its officers or stockholders or any of the creditors of the corporation, presented a written proposal to said corporation which is summarized as follows:

The said corporation be directed to issue 75,000 shares of its capital stock, held and unissued by said corporation as treasury stock, to the said G. McGuire Pierce; that a lease had been prepared on the mining property, the property of this corporation, by the attorneys representing the said G. McGuire Pierce, and was presented to the officers of this corporation for their signature on said date, the 21st day of November, 1950; and that the said G. McGuire Pierce would pay in cash to the Atolia Mining Company the sum of \$7700.00 to secure a full release from said company of all of their claims against the debtor corporation; that he would advance the sum of \$10,-000.00 to pay all of the remaining creditors of the debtor corporation; that present at said court hearing before the Referee and Special Master were all the officers and directors of the debtor corporation, and as they were then and there informed by the said G. McGuire Pierce that the lease he had drawn and his proposal were final insofar as he was concerned, the said officers and directors of said corporation and its stockholders, therefore, accepted said modified plan. That said acceptance was made without full and careful consideration of the best interests of the corporation, its stockholders, and its creditors.

4. That on the 29th day of November, 1950, with the consent of all the parties hereto and without objection of the debtor corporation, Lincoln Mining Company, Inc., the Judge of this Court made and entered an Order approving offer and plan of reorganization, said plan of reorganization being in substance the offer to debtor in reorganization filed in the office of the Clerk of the above entitled Court November 29, 1950; that said plan so approved included a lease and option agreement entered into November 21, 1950, between the debtor corporation as lessor and G. McGuire Pierce as lessee. That by virtue of said lease the lessor leased all of the patented and unpatented mining claims therein described for a period of 20 years commencing on the 25th day of November, 1950, and continuing to the 24th day of November, 1970, with the privilege of renewal for a further period of 20 years. That for the use and occupation of the leased premises, the lessee was to pay lessor a rental or royalty from the net returns of ore or other products of said leased premises. That by the terms of said lease the lessee is given an option to purchase the leased premises for the total purchase pries of \$150,000.00. That no work requirements are contained in said lease or plan of reorganization and by the terms of said lease and plan of reorganization the lessee could remain

in control of and in possession of all of the properties of the said debtor corporation described in said lease for as long as 40 years without performing work or labor on said mining property other than that which from time to time might be required under the laws of the United States and the State of Nevada and on the unpatented mining claims described in the lease.

That if work and labor were not performed upon said property, and particularly upon the patented mining claims described in said lease, the property would deteriorate in value and become of little or no value to said debtor corporation or to the stockholders of said corporation.

- 5. That said plan provides in addition to the lease above mentioned that the debtor corporation shall transfer free and clear to the lessor, G. McGuire Pierce, 75,000 shares of the treasury stock of the said corporation; that the capital stock authorized to be issued by said corporation is 300,000 shares of stock, and said plan further provides that the said lessee shall have a first claim for all royalties due under the lease until lessee has been repaid all sums advanced to said debtor as provided for in said plan.
- 6. That the debtor corporation now finds itself financially able to pay all legal claims against it including the claim of the Atolia Mining Company for machinery and equipment and the administrative expenses incurred in these proceedings; and upon the hearing of this Order to Show Cause, the debtor corporation exhibited its ability and willingness to

immediately pay claims of creditors and satisfy the claim of the Atolia Mining Company and the administrative expenses incurred in these proceedings, and exhibited its ability and willingness to make reasonable reimbursement to G. McGuire Pierce for monies actually expended after November 29, 1950, in furtherance of and pursuant to said plan.

- 7. That the plan of reorganization approved by the Judge of this Court November 29, 1950, under the conditions as they now exist is not fair or equitable.
- 8. That the lessee in said lease, G. McGuire Pierce, is entitled to be reimbursed, after November 29, 1950, the date the Order of this Court was entered approving the proposed plan of reorganization, for monies actually expended in furtherance of and pursuant to said plan.
- 9. That with the Order to Show Cause herein there was served the Findings and Report of the Referee and Special Master to which was attached the objections by Lincoln Mining Company, Inc., Debtor, to confirmation of the modified plan of G. McGuire Pierce, said objections having been filed with the Referee and Special Master December 15, 1950.
- 10. As to Finding No. 3 of the Referee and Special Master, the Court will not adopt such finding for the reason that it appears to the Court that the plan approved will not insure commencement of the operation of the property and said plan would

place it within the power of the lessee to refrain from operation of the property for as long as 40 years.

It is therefore Ordered, Adjudged and Decreed:

- 1. That the confirmation of the said amended and approved plan of reorganization referred to in the Order to Show Cause herein be, and it hereby is, refused.
- 2. That the lease and option agreement entered into on the 24th day of November, 1950, between Lincoln Mining Company, Inc. and G. McGuire Pierce be, and the same hereby is, rejected and is hereby declared null and void and of no effect.
- 3. That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement.
- 4. That after the filing with the Clerk of this Court of proper vouchers exhibiting the payment by the debtor corporation of all approved claims of creditors, expenses of these proceedings, and reimbursement to G. McGuire Pierce in a sum agreed upon by the parties, or determined by the Referee or the Judge of this Court, the Judge of this Court

will, after hearing upon notice to the debtor, stockholders, and creditors then remaining unpaid, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with or dismissing the proceedings as in the opinion of the Judge may be for the interests of creditors.

The Court reserves jurisdiction of these proceedings to make such other and further order under the Bankruptcy Act as to the Court may seem just and proper.

Dated: This 9th day of March, 1951, at Las Vegas, Nevada.

/s/ Roger T. Foley,
United States District Judge.

In the United States District Court for the District of Nevada.

In the Matter of Lincoln Mining Company, Inc.,

Debtor No.

In Reorganizat No. A-60-A

### ORDER OF REFERENCE

It appearing to the Court that in the "Findings of Fact and Order Refusing Confirmation of Plan" filed herein on March 9, 1951, it was ordered, among other things, as follows: "That in the event that the debtor corporation and G. McGuire Pierce do not agree within ten (10) days from date hereof as to the amount of reimbursement which should be paid to him for injuries resulting from the rejection of said plan and cancellation of the said lease, these proceedings will be referred to the Referee in Bankruptcy, Frank W. Ingram, for the purpose of hearing and considering and determining the proper amount to be paid to G. McGuire Pierce as such reimbursement".

It now appearing that no agreement has been reached between the debtor and G. McGuire Pierce, and that the time heretofore allowed for such an agreement has now expired,

It is Ordered that these proceedings be, and the same hereby are referred to Frank W. Ingram, Esq., Referee in Bankruptcy, for the purpose of hearing

and considering and determining the proper amount to be paid to G. McGuire Pierce as reimbursement for injuries resulting from the rejection of the plan and cancellation of the lease referred to in the "Findings of Fact and Order Refusing Confirmation of Plan".

Dated this 5th day of April, 1951.

Roger T. Foley, U. S. District Judge.

Filed April 5, 1951,

Amos P. Dickey, Clerk. By O. F. Pratt,

Deputy.

That it affirmatively appears from the records and files herein:

- (a) That all of the creditors of the debtor corporation have been paid by the corporation.
- (b) That all the expenses of these proceedings have been paid by the debtor corporation.
- (c) That the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court.
- (d) That G. McGuire Pierce refused to comply with that order of Court of the 9th day of March, 1951 and April 5, 1951 for adjudication of his claim, if any, for reimbursement for his expenses, if any. He thereby waived any claim he may have had, and has no right under the Bankruptcy Act to a hearing of his alleged claim in this Court.

(e) That for all the above reasons all questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court and the dismissal of the proceedings by the respondent Court.

Dated, Las Vegas, Nevada, July 18, 1951.

Respectfully submitted,

Morse & Graves,

By Harold M. Morse,

Attorneys for Appellee

and Movant.

# United States Court of Appeals For the Ninth Circuit

In the Matter of
Lincoln Mining Company, Inc. (a corporation),
Debtor.

G. McGuire Pierce,

Appellant,

vs.

Lincoln Mining Company, Inc. (a corporation),

Appellee.

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

## I.

That G. McGuire Pierce is not a party to these proceedings, nor is he a stockholder of this debtor corporation, nor is he a creditor of this corporation. There is a fundamental rule of law that a party who has no interest in the subject matter or proceedings cannot appeal.

### II.

That the only relationship between this debtor corporation and G. McGuire Pierce, appellant, resulted when G. McGuire Pierce wrote a letter to George W. Thiriot, president of debtor corporation, which resulted in the modification of the original plan of reorganization filed on November 6, 1950 by George W. Thiriot, president of debtor corporation, to the Referee in Bankruptcy, to which reference is made to the Findings of Fact and Conclusions of Law in the respondent Court.

### III.

That subsequently thereto, and at the time and place set for the consideration of the modified plan, G. McGuire Pierce, without prior notice to the debtor corporation, its officers, stockholders, or any creditors of the corporation, presented a written proposal to the debtor corporation, as found and considered in the respondent Court's Findings of Fact and Conclusions of Law, to which reference is hereby made. That at the time and place set for the confirmation of this plan by the Referee, to wit, December 15, 1950, debtor corporation filed its objections to the confirmation and requested a dismissal of the reorganization proceedings.

That at the time and place set by the respondent Court to show cause why said altered plan should be confirmed, notwithstanding the objection of debtor corporation, the respondent Court made its order refusing to confirm the said amended and approved plan of reorganization.

The debtor corporation respectfully submits to this Honorable Court that in view of the foregoing facts, G. McGuire Pierce, appellant, not being a creditor, stockholder or officer of this corporation, does not have the right to appeal.

## IV.

This Honorable Court has said in *Loomis v. Gila County* (C.C.A., Arizona, 1939), 103 F. (2d) 312, certiorari denied 59 S. Ct. 1041, 307 U.S. 643, 83 L. Ed. 1524, that in corporate reorganization proceedings, where a party is not interested in the proceedings or aggrieved by the order of dismissal, he has no right of appeal and the appeal, therefore, must be dismissed.

In the *Loomis* case above referred to there was a reorganization proceeding where a trustee was appointed and upon confirmation of a proposed plan of reorganization the Court dismissed the proceedings; there was no creditor appealing, stockholder appealing, nor was the debtor corporation appealing. The trustee appealed the order of dismissal and this Honorable Court dismissed the appeal.

### $\nabla$ .

Section 116 of Chapter 10 of the Bankruptcy Act (11 U.S.C.A., § 516(1)) gives the judge power to permit the rejection of executory contracts. The term "executory contracts" includes leases. (11 U.S.C.A., § 506(7).)

That G. McGuire Pierce has refused to comply with that order of the respondent Court of the 9th day of March, 1951 and April 5, 1951, for adjudication of his claim, if any; for reimbursement of his expenses, if any, and he therefore has waived any claim he may have had and has no right under the Bankruptcy Act to a hearing on his alleged claim to this Court.

## VI.

That the debtor corporation has been unable to find any adjudicated case with the same factual situation involved in this appeal. The debtor corporation respectfully submits to this Honorable Court that since all the creditors of this corporation have been paid by this corporation and the expenses of these proceedings have been paid by the corporation, the debtor corporation and all of its stockholders have moved that these proceedings be dismissed in the respondent Court; that all the questions in this case have become moot, and the only order remaining to be ordered is a dismissal of this appeal by this Honorable Court,

and the dismissal of the proceedings by the respondent Court.

Dated, Las Vegas, Nevada, July 18, 1951.

Respectfully submitted,

Morse & Graves,

By Harold M. Morse,

Attorneys for Appellee

and Movant.

